STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION
302 W. WASHINGTON STREET, SUITE E-306
INDIANAPOLIS, INDIANA 46204-2764

http://www.state.in.us/iurc/
Office: (317) 232-2701
Facsimile: (317) 232-6758

COMPLAINT OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED D/B/A SBC INDIANA FOR EXPEDITED REVIEW OF A DISPUTE WITH CERTAIN CLECS REGARDING ADOPTION OF AN AMENDMENT TO COMMISSION APPROVED INTERCONNECTION AGREEMENTS

CAUSE NO. 42749

You are hereby notified that on this date the Presiding Officers in this Cause make the following Entry:

On March 8, 2005, NuVox Communications of Indiana, Inc. ("NuVox"), a Respondent in this proceeding, filed its *Motion for Emergency Order to Enforce the Commission's January 21, 2005 Entry and Its Interconnection Agreement with SBC Indiana* ("Motion") with the Indiana Utility Regulatory Commission ("Commission"). The Motion requested a ruling on or before March 10, 2005. On March 10, 2005, a Docket Entry was issued directing the parties to complete their briefing of the Motion and, as an interim ruling, directing Indiana Bell Telephone Company, Incorporated d/b/a/ SBC Indiana ("SBC Indiana") to not deny a request by NuVox for unbundled access to high-capacity loops or dedicated transport based on a SBC determination that access is not required.

The Motion asserts that the Complainant in this Cause, SBC Indiana, has stated in certain Accessible Letters that on or after March 11, 2005, it intends to not provision certain orders for DS1 and DS3 loops, DS1 and DS3 transport, and dark fiber. Such action, according to NuVox, will cause it irreparable harm and will breach SBC Indiana's currently effective, Commission-approved interconnection agreement with NuVox. NuVox requests that the Commission issue a directive requiring SBC Indiana to (1) continue accepting and processing the orders for dark fiber, DS1 loops and transport, and DS3 loops and transport, under the rates, terms and conditions of NuVox's interconnection agreement from and between all wire centers in SBC Indiana's operating territory, and (2) comply with the change of law provisions of NuVox's interconnection agreement with regard to the implementation of the Federal Communication Commission's ("FCC's") *Triennial Review Remand Order* ("TRRO")[1] before implementing the Accessible Letters issued by SBC Indiana. SBC Indiana filed a Response to the Motion on March 9, 2005. In conformance with the March 10, 2005

[1] Order on Remand, *In re Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No.01-338, 2005 WL 289015 (FCC Feb. 4, 2005).

Docket Entry, SBC Indiana filed a Supplemental Response on March 14, 2005, and NuVox filed a Reply on March 17, 2005.

On March 9, 2005, we issued a detailed Docket Entry denying an emergency motion by certain other competitive local exchange carriers ("CLECs") in this proceeding with respect to the TRRO's effect on the continued provisioning of the unbundled network element platform ("UNE-P") as of the effective date of the TRRO (March 11, 2005). Having examined the Motion, the Responses and the Reply, as well as the relevant parts of the TRRO, we find much similarity in the overall intent and reasoning of the FCC in the TRRO with respect to non-impairment and the resultant transitioning away from UNE-P, dark fiber, DS1 loops and transport, and DS3 loops and transport. For that reason, we incorporate into this Entry, where relevant and appropriate, the background, reasoning and findings of the March 9, 2005 Entry in this Cause.

Unlike the FCC's finding to impose no unbundling requirement for mass market local circuit switching nationwide, the TRRO establishes impairment criteria to determine, within a particular wire center, whether an incumbent local exchange carrier ("ILEC") must provide or continue to provide a CLEC with unbundled access to dark fiber, DS1 loops and transport, and DS3 loops and transport. The determination that in certain situations a CLEC is impaired without unbundled access to high capacity loops and transport is, therefore, different from the nationwide determination that CLECs are not impaired without unbundled access to UNE-P.

However, with respect to situations of non-impairment, whether in the context of UNE-P or high capacity loops and transport, the TRRO establishes very similar plans to transition away from these service arrangements to alternative arrangements. Where impairment does not exist, the TRRO is consistent in establishing transition periods running from the effective date of the TRRO so that the embedded customer base (existing customers) can be moved in an orderly fashion to alternative arrangements. The TRRO also consistently finds that its intent to prevent disruption to the embedded customer base, by allowing those customers to continue to have unbundled access to certain network elements during the transition period, does not permit CLECs to add new customers via these unbundled network elements where no unbundling requirement exists.

With respect to DS1 and DS3 dedicated transport, and dark fiber transport, the TRRO at ¶142 states:

> Because we remove significant dedicated transport unbundling obligations, as described above, we find it prudent to establish a plan to facilitate the transition from UNEs to alternative transport options, including special access services offered by the incumbent LECs. Specifically, for DS1 and DS3 dedicated transport we adopt a twelve-month plan for competing carriers to transition to alternative facilities or arrangements, including self-provided facilities, alternative facilities offered by other carriers, or special access services offered by the

> incumbent LEC. As discussed below, we find it is appropriate to adopt a longer, eighteen-month transition plan for dark fiber transport. These transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists.

Similarly, with respect to DS1 and DS3 capacity loops, and dark fiber loops, the TRRO states at ¶195:

> Because we remove significant high-capacity loop unbundling obligations formerly placed on incumbent LECs, as described above, we find it prudent to establish a plan to facilitate the transition from UNEs to alternative loop options. Specifically, we adopt a twelve-month plan for competing carriers to transition to alternative facilities or arrangements, including self-provided facilities, alternative facilities offered by other carriers, or tariffed services offered by the incumbent LEC. As discussed below, we find it is appropriate to adopt a longer, eighteen-month, transition plan for dark fiber loops. These transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs pursuant to section 251(c)(3) where the Commission has determined that no section 251(c) unbundling requirement exists.

Like the motion that was the subject of our March 9, 2005 Entry, the Motion argues that only by initiating and completing the processes to amend the relevant interconnection agreements to incorporate the TRRO's changes in law would SBC Indiana be in a position to refuse access to DS1 and DS3 loops, transport, and dark fiber. SBC Indiana's challenge to this argument is based on its reading of the language and intent of the TRRO. Our discussion of this issue in the March 9, 2005 Entry is as applicable here to high capacity loop and transport UNEs where there is no impairment as it is to UNE-P. It is our finding, therefore, that the FCC is clear in its decision to eliminate DS1 and DS3 loops and transport, and dark fiber where there is no impairment, and that the intent of the TRRO is to not allow new additions of these UNES as of March 11, 2005. There is, of course, the same concern here as there is with UNE-P, that there be a transition period in which alternative service arrangements can be made for the embedded base of loop and transport customers existing as March 10, 2005.

The Motion also argues that notwithstanding the effect of the TRRO on ILEC unbundling obligations, state law, prior Commission Orders, Section 271 of the federal Telecommunications Act of 1996[2] ("Act"), and the SBC/Ameritech Merger Order[3] provide separate, affirmative unbundling obligations. SBC Indiana disputes each of these other authority arguments. For purposes of ruling on this emergency Motion we have

[2] The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

[3] *Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control*, 14 FCC Rcd 14712 (1999).

reviewed no other authority argument that compels us to find that the requirements of the TRRO should be set aside in deference to some other authority that may require unbundling. This latest chapter in the infamous history of the FCC's various efforts to adopt sustainable rules to implement the unbundling requirements of the Act culminates with the requirements found in the TRRO. It is within the context of this history that CLECs, ILECs, the FCC, federal courts, and state commissions have for years struggled with unbundling requirements. So while we do not find that no other authority exists to regulate the unbundling of UNEs, we cannot reasonably conclude, for purposes of ruling on this emergency Motion, that any of the other authority arguments presented should supercede the significant weight of authority carried by the TRRO.

Our March 9, 2005 Entry stated our expectation that both SBC Indiana and all affected CLECs will make changes to their interconnection agreements consistent with the requirements of the TRRO. We strongly repeat that expectation in this Entry, noting that the TRRO's discussion of DS1 and DS3 loops and dedicated transport specifically enumerates, in ¶¶ 196 and 143, that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes." With respect to dark fiber loops and transport, ¶¶ 197 and 144 of the TRRO allow a lengthier, eighteen month, transition period. It is essential that appropriate modifications to interconnection agreements are made in a timely manner, particularly to the extent that such modifications will ensure an orderly transition of embedded customers.

Our March 10, 2005 Entry ruled on an interim basis that SBC Indiana should not, after March 10, 2005, deny access to high capacity loops and transport based on a SBC determination that access is not required at a particular wire center. Having examined SBC Indiana's responses to the Motion we find the need to reiterate as a final ruling our statement that a determination of impairment is to be made pursuant to the TRRO, and particularly ¶234 of the TRRO, and not pursuant to a SBC determination that impairment does or does not exist.

We now understand that the FCC requested, and SBC has submitted, a list of wire centers that SBC believes satisfies the impairment criteria established in the TRRO for high capacity loops and transport. We do not, however, find in the TRRO any pronouncement of a specific nexus between such a list and the CLEC obligation to make a reasonably diligent inquiry before self-certifying that it is entitled to access to these elements as UNEs. Given the seemingly objective impairment criteria established in the TRRO, it seems reasonable that examination of the ILEC-created list would be of value to a CLEC's reasonably diligent inquiry. There is, however, no basis to conclude that a CLEC's self-certification could not be based on a reasonably diligent inquiry that led to a determination of impairment at a particular wire center that is contrary to an ILEC determination of impairment. The TRRO, at ¶234, describes how such a dispute is to be addressed; it is to be raised by the ILEC subsequent to provisioning of the UNE. The Commission should tolerate neither an ILEC's refusal to provision a UNE based on its unilateral impairment determination nor a CLEC's abuse of its ability to self-certify the existence of impairment.

Based on the above, NuVox's Motion, filed in this Cause on March 8, 2005, is denied.

IT IS SO ORDERED.

Judith G. Ripley, Commissioner

William G. Divine, Administrative Law Judge

Date